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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALLACE C. YOST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Wallace C. Yost objected to the United States District Court of the Northern District of Florida conducting an entirely new sentencing, with changed findings of fact and conclusions of law, when it was merely required to correct a single sentencing error. Three days after sentence was pronounced in open court, the district court resentenced petitioner, ostensibly because of an error it had made in applying one of the United States Sentencing Guidelines and the court below gave the green light to that practice. It held that, upon discovery of a clear error, a sentencing court has the authority to conduct a new sentencing, notwithstanding the plain language of Fed. R. Crim. P. 35(c) and the explanation of the rule's contemplated operation contained in the Advisory Committee Notes (1991 Amendment) to the rule. The question presented here is:

Does Fed. R. Crim. P. 35(c) authorize a court to conduct an entirely new sentencing and resentence a defendant by altering findings of fact and conclusions of law on issues previously resolved when correcting an arithmetical, technical or other clear error?

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PETITION FOR WRIT OF CERTIORARI

Wallace C. Yost respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 14, 1999, in order to maintain uniformity in the application of an important Federal Rule of Criminal Procedure and to preserve the plenary rulemaking authority of the Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is reported at 185 F.3d 1178 (11th Cir. 1999), and is reprinted in Appendix A hereto ("App. A") at page 1a. By order entered October 14, 1999, the Eleventh Circuit denied the petition for rehearing and petition for rehearing en banc. App. B, 9a.

JURISDICTION

Following sentencing, petitioner timely appealed to the Eleventh Circuit, which affirmed the sentence in an opinion filed on August 11, 1999. On October 14, 1999, the court below denied the timely filed petition for rehearing and petition for rehearing en banc. Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED IN THIS CASE

28 U.S.C. § 2072(a) (Appendix C) and Federal Rule of Criminal Procedure 35(c) (Appendix D).

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to two counts of a four count indictment returned in the United States District Court for the Northern District of Florida. The offenses of conviction were one count of conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud, in violation of 18 U.S.C. § 371, as well as a single count of the substantive offense of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2.

Sentencing was first held on March 24, 1998. Following protracted discussion and its analysis of the law and the offenses involved, the district court determined that the appropriate offense level under the United States Sentencing Guidelines was 17, mandating a guideline range of punishment of 24 to 30 months of incarceration. The district court granted the government's motion for downward departure filed in accordance with U.S.S.G. § 5K1.1 and sentenced petitioner to a term of 14 months imprisonment on both counts. The court ordered that the terms of imprisonment be served concurrently, ordered that petitioner pay a fine in the amount of $10,000.00 and

ordered restitution in the amount of $50,000.00. Even though sentence was pronounced, this was not the end of petitioner's sentencing.

Three days later, the district court again had petitioner appear for sentencing. This "new" sentencing took place the day following the sentencing hearing for petitioner's codefendant.[1] At the second sentencing proceeding the district court vacated the original sentence, reversed its factual findings and legal conclusions concerning bank fraud as relevant conduct for sentencing purposes under U.S.S.G. § 1B1.3, sentenced petitioner to a term of imprisonment of 18 months, a term matching that of the codefendant, and increased the restitution amount payable by petitioner by $1,000,000.00.

At petitioner's original sentencing, much time was spent determining what would be the conduct relevant to be considered for sentencing purposes. The determination was wholly dependant upon the application of the meaning and scope of *United States v. Mueller*, 74 F.3d 1152 (11th Cir. 1996). After protracted discussion and argument the district court found and concluded that *Mueller* was applicable to the facts of petitioner's case and that his action in giving less than complete information in the course of a discovery deposition conducted

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[1] Petitioner's codefendant went to trial and was convicted by the jury of all counts with which he was charged. At the sentencing of Mr. Fleming (the codefendant) the district court observed " . . . it troubles me that Mr. Yost [petitioner herein], unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me."

pursuant to corporate bankruptcy proceedings did not constitute bank fraud. The bank fraud theory advanced by the government was that petitioner's evasive and incomplete answers frustrated federally chartered institutions' efforts at collecting on judgments it held against several of petitioner's corporations. The district court correctly observed that petitioner had never filed for bankruptcy and the various assets which were at issue in the bankruptcy deposition " . . . were not subject to any liens or security interests that were recorded and were not generally subject to the Bankruptcy Court at all." At the original sentencing the district court rejected the various theories of the government that petitioner's conduct in the context of corporate bankruptcy proceedings constituted bank fraud and determined that petitioner's culpability for bank fraud turned on one issue:

> So I narrow it down to really the only thing that's left and that is the deposition of Mr. Yost in the avoidance of the creditors' efforts to execute on their judgments and collect by testifying falsely, and is that within *Mueller*? That's really the narrow issue here. Is that enough to fall within *Mueller* or is it outside *Mueller*? And as I have already said, in the absence of *Mueller* there would be no doubt that kind of conduct would, in my judgment, fall within Part 1 of the bankruptcy fraud statute, in 1344, which is very broad and is generally being construed broad. But in light of *Mueller*, it certainly casts everything in doubt. So – so that's where we are. But I am constrained to follow *Mueller*. And strictly applying *Mueller* to the facts of this case in the civil litigation process, it seems to me that what Mr. Yost did was part of a civil litigation process

> and outside of the bank fraud statute, according to the Eleventh Circuit. So, therefore, I am gonna [sic] have to sustain the objection on the basis of *Mueller.*

The sentencing court made some troubling observations in the course of the codefendant's sentencing hearing which demonstrated that the court was distressed that the codefendant was being sentenced to a greater term of imprisonment than was petitioner, stating explicitly that the court " . . . was not comfortable sentencing Mr. Fleming to more than [it] had sentenced Mr. Yost."

While the district court realized it had committed a clear error by utilizing the money laundering guidelines, U.S.S.G. § 2S1.1, for sentencing purposes, instead of the generic fraud guidelines, U.S.S.G. § 2F1.1, and could have simply corrected the sentence by applying the correct guideline, the district court went further. It believed that instead of merely being required to apply the correct guideline, Fed. R. Crim. P. 35(c) allowed it to completely resentence petitioner, including revising its findings of fact and conclusions of law with respect to the previously resolved issue of whether petitioner's actions in the course of the corporate bankruptcy proceedings constituted bank fraud.

The Eleventh Circuit condoned the action by the district court in affirming petitioner's sentence. In its view, " . . . it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not." App. A, 8a. The Eleventh Circuit's holding essentially rewrites Rule 35(c) by permitting

imposition of an entirely new sentence when all that is required is a simple correction of an error.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Opinion Essentially Rewrites Fed. R. Crim. P. 35(c) And Usurps This Court's Plenary Rulemaking Authority

The decision below authorizes any sentencing court to totally revamp a defendant's sentence when it notices a clear error in a sentence that has already been imposed. By thus holding, the Eleventh Circuit eviscerates the admonition that Rule 35(c) is to be used solely to " . . . correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). As courts have noted, Rule 35(c) was never intended to afford the court the opportunity "to reconsider the application or interpretation of the sentencing guidelines or of the sentence." *United States v. Demartino*, 112 F.3d 75, 79 (2d Cir. 1997), quoting Fed. R. Crim. P. 35(c) Advisory Committee Note (1991 Amendment); *United States v. Fraley*, 988 F.2d 4 (4th Cir. 1993).

Congress has granted this Court the authority to promulgate rules of procedure for the district courts. *See* 28 U.S.C. § 2072(a). With the promulgation of Rule 35(c) in 1991, the Court carefully circumscribed the situations in which a sentencing court may correct a sentence that has already been imposed.[2]

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[2] The Eleventh Circuit did not deem it necessary to reach the issue of when a sentence is actually imposed. It did,

Before the 1991 amendment which added Rule 35(c), there was some doubt about whether a district court had the authority to alter a sentence except in two circumstances: either after a remand from an appellate court, or in response to a government motion. "Under the literal language of Rule 35 as adopted in 1984, district courts had no authority to modify a sentence either *sua sponte* or upon motion of the defendant." *United States v. Fraley*, 988 F.2d at 6. "On its face, the amended rule authorized the correction of a sentence only on remand . . . and a reduction of a sentence only upon motion by the government 'to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person' who has committed an offense." *United States v. Corey*, 999 F.2d 493, 495 (10th Cir. 1992), quoting Fed. R. Crim. P. 35(b). The restrictive nature of former Rule 35 resulted in at least two courts holding that sentencing courts had the inherent power under the sentencing guidelines to reconsider a sentence during the period in which any party was authorized to file notice of appeal, notwithstanding the literal language of the rule. *See United States v. Cook*, 890 F.2d 672 (4th Cir. 1989), and *United States v. Rico*, 902 F.2d 1065 (2d Cir.), *cert. denied*, 498 U.S. 943 (1990). "The

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however, note the split in the circuits between the majority view that a sentence is imposed when orally pronounced, *see United States v. Gonzalez*, 163 F.3d 255, 264 (5th Cir. 1998); *United States v. Layman*, 116 F.3d 105, 108 (4th Cir. 1997), *cert. denied*, ___U.S.___, 118 S.Ct. 1034 (1998); *United States v. Abreu-Cabrera*, 64 F.3d 67, 73-4 (2d Cir. 1995); *United States v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994), and the opposite view that it is imposed when judgment is entered. *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994); *United States v. Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1993) (in dicta). App. A, 5a n. 4.

1991 amendment to Rule 35(c) was intended to codify the result reached in *Rico* and *Cook* but requires as well that the sentencing court act *within* the time frame prescribed in the rule." *United States v. Fahm*, 13 F.3d 447, 453-54 (1st Cir. 1994) (emphasis in original). The authority to correct a sentence was not intended to grant to a district court the far-reaching authority to completely resentence a defendant after sentence had been pronounced, even if such action were taken within the seven day window. As the Advisory Committee stated:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Fed R. Crim. P. 35(c) Advisory Committee Note (1991 Amendment). In the present case, the district court did not simply correct the sentence by applying the correct guideline, it completely resentenced petitioner. That resentencing was not the "result of arithmetical, technical, or other clear error", but instead was the result of the court's view of petitioner's sentence which crystallized after the court had sentenced his codefendant.

The district court was clearly disturbed at the prospect of the codefendant receiving a sentence which included a greater period of incarceration than petitioner had received. That would happen unless the court were somehow able to grant a downward departure for the codefendant. As the district court stated at the codefendant's sentencing:

> Well, let me say to both of you, it troubles me that Mr. Yost, unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me. I – I may need to revise my – at least review the Supreme Court's decision because there are a number of things that they point out or suggest as considerations, and Mr. Beard [the prosecutor] says that he does not think that Mr. Fleming falls within any of those. . . . Because it is troubling me, and if I can depart, what I would like to do is give Mr. Fleming a sentence exactly the same as I gave Mr. Yost. I certainly hate to have Mr. Fleming with a sentence more than Mr. Yost had. But to do that, it requires a departure."

Later, the court further observed:

> I – I think I had indicated my feelings to you that I was not comfortable sentencing Mr. Fleming to more than I had sentenced Mr. Yost. Of course, Mr. Yost received a 5K1 motion and did not go to trial, so there is certainly a basis for that, but I wanted to do some research and see if under the Supreme Court's *Coon* [sic] decision and I think the law that otherwise applies to this Circuit where departures are authorized. And I have not found anything really that would specifically allow me to depart.

The sentencing court was unable to depart downward and the codefendant received a sentence which included a term of imprisonment exceeding that received by petitioner by four months.

The court had expressed its dilemma and it had now come to pass: the codefendant had received a sentence which included a term of imprisonment greater than that received by petitioner, a situation clearly "troubling" to the sentencing court. How did it resolve this troubling dilemma? The court determined that when petitioner was returned to correct the sentence due to the misapplication of U.S.S.G. § 2S1.1, it would not only correct that error but would completely resentence petitioner.

When petitioner appeared before the sentencing court again, a totally new sentencing hearing was conducted, despite the fact that sentence had already been imposed. As the court explained its view concerning why it believed it had the authority to "correct" the sentence:

> So, accordingly, I'm setting aside the sentence I have previously imposed on March 24th, which has not yet become final, both under Rule 35(c) and under the fact that no J and C has been entered, it was expressly retained under this court's jurisdiction to revisit the statute of limitations issue previously identified. So I'm setting aside that sentence. But let me also advise counsel that at this time, I'm also gonna (sic) revisit the application of *United States v. Mueller*, to this case, because I think there are matters that perhaps need to be amplified further with respect to the facts of this case vis-a-vis the Eleventh Circuit's rationale in the *Mueller* decision.

This issue was revisited despite the fact that only three days earlier the court had conducted a painstaking analysis of the precise issue and had made specific factual findings and conclusions of law. Those should have been final since Rule 35(c) " . . . is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guideline . . . [N]or should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Fed. R. Crim. P. 35(c) Advisory Committee Notes (1991 Amendment).

The Eleventh Circuit condoned the court's action. In the face of the overwhelming evidence to the contrary, the court declared, " . . . the district court did not simply change its mind; nor did it simply reconsider its calculations under the appropriate guidelines. Rather, it resentenced Appellant because at the first sentencing hearing it used the wrong guideline, an obvious error. We therefore hold the district court had authority to resentence Appellant pursuant to Rule 35(c)." App. A, 7a (footnote omitted). The Eleventh Circuit completely missed the point. While the district court had the authority under Rule 35(c) to correct its error in using an incorrect guideline, the rule does not give a sentencing court carte blanche to resentence when an error is made.

Despite the plain language of the rule and the Advisory Committee's strong admonition that its use be narrow the court below, in essence, rewrote the rule and broadened its application by holding that " . . . it only takes one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at

which the court may correct any other errors, clear or not." App. A, 8a. Without a shred of discussion of whether the court's analysis was correct on the issue of bank fraud as relevant conduct the court below gave free reign to sentencing courts to completely revamp any sentencing if a single, discreet, and easily correctable error is found. The policy implications for such a holding are grave.

In granting to district courts the power to completely resentence defendant when a simple correction of an arithmetical, technical, or other clear error is possible, the Eleventh Circuit has effectively usurped the rulemaking function of this Court by drastically broadening a sentencing court's power. In promulgating Rule 35(c), an exceedingly narrow basis for correcting errors was created in order to afford courts the ability to correct plain errors. As the Advisory Committee Note to the 1991 Amendment makes plain, the rule is not to be used to resentence defendants based upon a change of mind, or its view of the appropriateness of a particular sentence. *See United States v. Layman* 116 F.3d at 109 (modification of sentence due to change of heart by court is impermissible). By affirming petitioner's sentence, the Eleventh Circuit broadened the scope of Rule 35(c) so wide that its original intent will now be unrecognizable. The Court should grant the writ in order to review the misguided decision of the court below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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